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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

NO. 681

RAILROAD COMMISSION OF TEXAS ET AL.,
Petitioners

v.

ROWAN & NICHOLS OIL COMPANY,
Respondents

REPLY BRIEF FOR PETITIONERS

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Fifth Circuit

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I.

Reply to Respondent's "Statement in Respect to Jurisdiction"

In respondent's brief, (p. 1) attention is called to the fact that the Railroad Commission, after the perfection of the appeal in this case to the Circuit Court of Appeals, promulgated and is now enforcing proration orders for the East Texas field "which are substantially different from the order and plan of proration involved in this case." Without saying so explicitly, respondent intimates that the case has

become moot because of the promulgation and enforcement of the new orders. In order that the court may be acquainted with the facts as to the promulgation of the new orders, if it considers them to be relevant to this appeal, we state them briefly below.

(1) *Change in proration orders.*

This case was tried from February 6, 1939, through February 10, 1939, but the final judgment was not entered until June 14, 1939. (R. 76, 78) A motion for stay of judgment was presented by the Railroad Commission on June 14, 1939, (R. 79) which was overruled by the District Court (R. 83) Notice of appeal was given on June 19, 1939, (R. 83) A motion for a stay was then presented to the Circuit Court of Appeals and was denied by that court. The proceedings on this motion before the Circuit Court of Appeals are omitted from the record.

Soon after the judgment of the District Court was entered in this action, numerous petitions were filed by operators of extensive properties in the East Texas oil field for an increase in their allowables. The Railroad Commission called a hearing for August 16, 1939, with reference to the question of the modification of the proration orders relating to the East Texas oil field, and particularly as to the application of Humble Oil & Refining Company for an increase in the allowables on its properties. Before this hearing could be held, on July 26, 1939, Humble Oil & Refining Company filed its suit in the United

States District Court for the Western District of Texas, being Civil Action No. 31, entitled *Humble Oil & Refining Company v. Railroad Commission of Texas, et al.*, asking for interlocutory and final injunctive relief against the enforcement of the proration orders of the Railroad Commission and particularly the order of June 19, 1939, which was substantially the same as the order involved in this case. A hearing was held before a three-judge District Court at San Antonio, Texas, on August 10, 1939, and on August 11, 1939, the three-judge District Court issued a preliminary injunction enjoining the Railroad Commission from enforcing its proration orders against the properties of the Humble Oil & Refining Company, which then operated about 2,545 wells scattered throughout the East Texas oil field.

Upon the granting of the temporary injunction by the three-judge District Court in the Humble case, the Railroad Commission was faced with the choice of either allowing the field to be prorated by injunction, or of adopting some different order which could be enforced until a final determination of the appeal in the Rowan & Nichols Oil Company case could be obtained. The properties of Humble Oil & Refining Company were so extensive that it was not possible to operate the field under any method of regulation which could not be applied to such properties. On August 15, 1939, the Railroad Commission of Texas issued an order shutting down completely the entire East Texas oil field for a period of fifteen days. On August 16, 1939, and for several days thereafter the Railroad Commission

held its hearing with reference to the application of Humble Oil & Refining Company for an increase in allowables on its wells. On September 11, 1939, the Railroad Commission of Texas adopted a proration order, which kept the 20 barrel per well base or minimum allowable, but which raised the total daily field allowable to 690,000 barrels, as compared with the previous daily field allowable of 522,000 barrels, and which prorated the excess of the field allowable above the 20-barrel base or minimum allowable on the factors of well potential, sand thickness, acreage and bottomhole pressure.

The Humble Oil & Refining Company was not satisfied with the change in the proration order adopted by the Railroad Commission, and on October 3, 1939, filed its supplemental complaint praying for a second interlocutory injunction on the ground that the new order of September 11, 1939, was substantially the same as the order of June 19, 1939. On November 10, 1939, a three-judge District Court denied the application of Humble Oil & Refining Company for a second interlocutory injunction on the ground that the Humble Oil & Refining Company did not show any irreparable injury from the application of the proration order of September 11, 1939, and renewals thereof.

The trial on the merits in the Humble case came up on February 13, 1940, and was heard jointly with an attack on the new order by Rowan & Nichols Oil Company, being Civil Action No. 46, entitled *Rowan & Nichols Oil Company v. Railroad Commis-*

sion of Texas, et al. On February 21, 1940, the court indicated that it would enter a permanent injunction in favor of the plaintiffs enjoining the proration orders of the Railroad Commission, unless the Commission submitted to the judgment of the court and indicated within ten days that it would not appeal the case. On March 1, 1940, the Railroad Commission stated to the court that it would appeal the Humble case, as well as the second Rowan & Nichols case, and the Commission then applied to the court for a stay of the injunction pending the appeal. On March 11, 1940, the Supreme Court granted a writ of certiorari in this case. On March 14, 1940, the three-judge District Court was reconvened at Houston, Circuit Judge Sibley and District Judge McMillan sitting, and it was then announced that in view of the action of the Supreme Court in granting a writ of certiorari in this case, the motion for a stay pending appeal would be granted in the Humble case and also in the second Rowan & Nichols case. On March 19, 1940, a judgment was entered in the Humble case, granting a permanent injunction, but staying the execution of the injunction until sixty days after the date of the judgment. A judgment has not yet been entered in the second Rowan & Nichols case, although the District Court has stated that it will enter judgment against the Railroad Commission in that case.

On April 1, 1940, a petition for appeal was presented and allowed in the *Humble* case, and this case has been docketed in this court as case No. , entitled *Railroad Commission of Texas et al., Ap-*

pellants, v. Humble Oil & Refining Company, Appellee.

From the foregoing facts, it is apparent that the change in the proration order by the Railroad Commission of Texas was made under the pressure of a temporary injunction issued by the three-judge District Court on August 11, 1939, and in the face of the certain disruption of the East Texas field if some such step was not taken by the Railroad Commission to provide for the uniform regulation of the field. The Railroad Commission has excepted the Rowan & Nichols Oil Company property from the operation of the new orders and has at all times done everything within its power to have the determination of the validity of the proration orders involved in this case finally determined by this Court.

(2) *Reasons why the present appeal has not become moot because of the change in the proration orders.*

(a) The respondent in the District Court prayed, not merely for an injunction against the specific proration order of August 29, 1938, but also for an injunction against "any and all similar monthly proration orders and schedules for the East Texas Field; and further enjoining the Railroad Commission from enforcing against the Complainant any rules and orders governing and providing for the prorating of oil in the East Texas Field that deny the Complainant a right to produce that proportion of the total daily allowable that the recov-

erable oil under its lease bears to the total recoverable oil in the East Texas Field. . . .” (R. 14)

(b) It was agreed by the parties that “it would be unnecessary to amend to cover the orders subsequently entered continuing the same plan of proration.” (R. 64, 666-667)

(c) The judgment of the court not only enjoined the Railroad Commission specifically from enforcing the orders of August 29, 1938, and December 14, 1938, but also enjoined the Commission from enforcing or attempting to enforce “any such plan of proration or allocation of field allowable among wells as said orders have been interpreted by the Railroad Commission to require,” and further permanently enjoined the Railroad Commission “from interfering with complainant in daily producing from the wells on its said lease (except on such days as the entire East Texas oil field may be, by valid order of the Railroad Commission, prohibited from producing) that amount of oil which bears to the daily allowable fixed by the Railroad Commission the ratio which 220 barrels bears to 522,000 barrels.” (R. 78)

(d) Under the court’s injunction, the Rowan & Nichols Oil Company has produced daily an amount of oil approximately double the amount permitted under the orders of the Railroad Commission attacked in this case and also an amount in excess of the amount which would be permitted under the orders of September 11, 1939, and succeeding or-

ders, if they had been enforced against the property of the plaintiff. The question remains undecided as to whether this oil has been legally produced, and whether the Commission, if the judgments of the lower courts below are reversed, would not be allowed to adjust the future production from the Rowan & Nichols oil lease in order to account for the excess that has been produced under the court's injunction.

(e) The Railroad Commission of Texas is a continuing administrative body, and its powers to prorate and regulate the production of oil in the East Texas field are also continuing. The validity of the proration orders involved in this case is a question of great public importance which should be settled for the future guidance of the Railroad Commission. The Railroad Commission has not renounced any intention of promulgating similar orders in the future, but has at all times endeavored to have the validity of such orders finally adjudicated so that it may be guided in its future orders.

The change in the proration orders, under the circumstances stated above, does not render this appeal moot. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *Southern Pacific Company v. Interstate Commerce Commission*, 219 U. S. 433; *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U. S. 498; *McGrain v. Daugherty*, 273 U. S. 135; *Leonard v. Earle*, 279 U. S. 392; *Newport News Shipbuilding and Dry Dock Company v. Schauffler*, 303 U. S. 54;

United States v. Rock Royal Co-operative, Inc., 307
U. S. 533.

II.

Under Rule 52 of the Rules of Civil Procedure, it was not necessary that petitioners except to the findings of fact or request that they be changed or that additional findings be made in order to challenge the sufficiency of the evidence to support the judgment of the District Court.

On page 3 of its brief, respondent points out that the petitioners did not except to the findings of fact by the court, or request that they be changed or that additional findings be made. The necessity for such exceptions, objections or requests was expressly eliminated by the provisions of Rule 52 of the Rules of Civil Procedure.

Under Rule 52 (a) it is provided that, "Requests for findings are not necessary for purposes of review."

Under Rule 52 (b) it is provided, "When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the District Court an objection to such findings or has made a motion to amend them or a motion for judgment."

The petitioners, having made proper assignments of error attacking the holdings of the lower courts to the effect that the proration orders of the Railroad Commission are arbitrary and unreasonable and that the respondent showed itself to be injured thereby, are entitled to challenge the sufficiency of the evidence to support the findings upon which the judgment is based. Compare *Hill v. Ohio Casualty Insurance Company*, 6 Cir., 104 F. (2d) 695, 696; *Jackson County v. Alton Railroad Company*, 8 Cir., 105 F. (2d) 633, 639 (cer. den. 84 L. ed. 134); *Stoltz v. United States*, 9 Cir., 99 F. (2d) 283, 284; *Anglo California National Bank v. Lazard*, 9 Cir., 106 F. (2d) 693, 706.

Respectfully submitted

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**ACKNOWLEDGMENT OF SERVICE
OF REPLY BRIEF**

Service of the foregoing reply brief is acknowledged this day of April, 1940.

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